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BEFORE THE

FEDERAL AVIATION ADMINISTRATION

U.S. DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

Hazardous Materials Training Requirements
Docket No. FAA–2003–15085 - 43

Comments of:

United Parcel Service, Inc.

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United Parcel Service, Inc. (UPS) submits the following comments in response to the Notice of Proposed Rulemaking: Hazardous Materials Training Requirements, Docket No. FAA–2003–15085, issued by the Department of Transportation, Federal Aviation Administration (FAA) on May 8, 2003 (the "Proposed Rule").[1]

UPS is the world's largest package distribution company and the world's largest express package and document delivery company. UPS delivers more than 13 million documents and parcels every day worldwide for 7.9 million customers. Its airline (UPSCO) is among the ten largest airlines in the United States, operating more than 1,500 flight segments per day in more than 600 domestic and international airports. UPS generally understands the desire for amendments to FAA's hazardous materials regulations, to the extent such revisions promote safe air transportation practices without unduly burdening commerce. The Proposed Rule, however, unjustifiably will expand the applicability and scope of hazardous materials training for Part 121 certificate holders, will impose substantial costs far in excess of FAA's estimates, and will impose a substantial and undue burden on interstate commerce.

UPS's comments to the Proposed Rule are outlined below. Given the sweeping scope of the Proposed Rule, UPS reserves the right to submit additional comments to the Proposed Rule and requests FAA's due consideration of such comments. UPS further requests that the FAA provide the regulated community with a public meeting at which FAA will field questions and accept further comments concerning this rulemaking. The current integrated transportation climate is extremely complex, and all stakeholders would benefit from an open and thorough consideration of the Proposed Rule and its ramifications.

1. Request for Clarification Concerning the Scope of the Proposed Rule's Training Requirements: Comments submitted by the National Transportation Safety Board (NTSB) to Docket No. FAA–2003–15085 state: "The Board notes that the proposed training requirements

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[1] 68 Fed. Reg. 24,810 (2003).

would apply only to passenger air carriers. The FAA confirmed to the Safety Board that the proposed requirements would not apply to cargo-only carriers or to the cargo-only operations of passenger carriers."[2] The NTSB's assessment of the Proposed Rule is defensible, given that the Proposed Rule addresses issues pertaining to NTSB Safety Recommendations directed at passenger air carriers. However, the proposed training requirements could be construed as also applying to certificate holders engaged in cargo-only operations. In any subsequent notices in this rulemaking, the FAA should clarify whether the Proposed Rule's training requirements apply solely to passenger air carriers, a point in which UPS has a significant interest.

As this possible distinction between passenger and cargo-only operations is not made clear in the body of the NPRM, we will assume, until otherwise informed, that this proposal will apply equally to all Part 121 and 135 air carriers. Therefore, we will provide in the following comments a discussion of the concerns that UPS identifies with the proposal.

2. Proposed 14 C.F.R. §§ 121.801, 121.802, and 121.803: 14 C.F.R. § 121.433a(a) currently provides that a Part 121 certificate holder may not use any person to perform, and no person may perform, "any assigned duties and responsibilities for the handling or carriage of dangerous articles and magnetized materials governed by 49 CFR" without that person's having obtained the requisite hazardous materials training. The current rules correctly limit the applicability of such training to a person who performs functions subject to the requirements of the Hazardous Materials Regulations, 49 C.F.R. Parts 170-185 (the "HMR"), and implicitly acknowledge that the HMR contain the principal regulations governing the safety of the handling, shipment, and carriage of hazardous materials.

The Proposed Rule, specifically proposed 14 C.F.R. §§ 121.801(a), 121.802(a), and 121.803(a), expands the scope of hazardous materials training for Part 121 certificate holders without any justification or support in the administrative record. In a marked departure from its current rules and advisory circulars, FAA appears to propose requiring hazardous materials training for any person performing or supervising "transportation-related functions" that are completely unrelated to hazardous materials transportation safety. Such functions, which are enumerated in proposed § 121.801(a), include any function performed for the certificate holder relating to the acceptance, rejection, storage incidental to transport, handling, packaging of COMAT, loading, unloading or carriage "involving any *item* for transport on board an aircraft."[3]

In the preamble, FAA states that it interprets the undefined term "item" to encompass not only hazardous materials, but *all* non-hazardous materials as well.[4] Consequently, the "functions" contained in § 121.801(a)(1)-(8) could encompass almost every activity conceivably related to air transportation, and therefore could require training for all employees of a Part 121 certificate holder, regardless of whether such persons perform a function related to hazardous materials transportation safety. Adding profoundly to the scope of the current training

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[2] Letter from Ellen G. Engleman, Chairman, Nat'l Transp. Safety Bd., to Dockets Management System, U.S. Dep't of Transp., FAA-2003-15085-29 (July 1, 2003).

[3] 68 Fed. Reg. at 24,822.

[4] *Id.* at 24,814.

requirements, FAA also proposes to require training for any person "supervising" any of the transportation-related functions enumerated in proposed § 121.801(a)(1)-(8).[5]

This departure from FAA's current hazardous materials training rules lacks any support in the administrative record. FAA fails to articulate a reasoned basis for requiring a certificate holder to provide hazardous materials training to employees who do not perform or supervise any functions regulated under the HMR or who do not otherwise directly affect hazardous materials transportation safety. For example, FAA provides no rationale why an employee who performs "storage incidental to transport" of "items" destined for transport on an aircraft must receive hazardous materials training if the stored items are not classified as hazardous materials under the HMR. As drafted, however, Appendix N would require such an employee[6] to complete every single hazardous materials training "module."[7]

The impermissibly broad scope of the Proposed Rule would place a substantial and unjustified burden on training development and delivery at UPS in several other ways. Proposed 14 C.F.R. §§ 121.801(a) and 121.803(a) could require package car drivers and customer-counter personnel – employees far removed from the transportation of packages by air – to obtain training under an FAA-approved training program merely because they perform, among other things, "acceptance," "rejection," "handling," "loading," and "unloading" functions involving "items" destined for transport aboard an aircraft.[8] (It is important to note that approximately eighty-five percent (85%) of the packages UPS handles are offered in Ground Service, so they will not fly. Due to the extensive nature of the UPS ground network, even some of packages offered at an air service are delivered without being transported aboard an aircraft.) FAA has failed to provide any rational basis or record support for such a drastic expansion of its hazardous materials training requirements. There is no objection to the idea that such employees have function-specific hazardous materials training under the DOT Hazardous Materials Regulations, tailored to their job responsibilities, as discussed below.

FAA also fails to articulate a reasoned basis for requiring hazardous materials training for all persons "supervising" transportation-related functions involving items for transport aboard an aircraft. In the preamble, FAA states that the term "supervise . . . would cover a person who has any degree of oversight over a function addressed by the proposed rule."[9] The Proposed Rule, however, addresses almost every conceivable function related to the transportation of any *item* – which includes non-hazardous materials – aboard an aircraft. Thus, the Proposed Rule could require training for every employee of a certificate holder with any supervisory responsibilities whatsoever. Indeed, the Proposed Rule could be interpreted as requiring FAA-approved hazardous materials training for a Part 121 certificate holder's chief executive officer, even though that person may not perform a single function directly affecting hazardous materials transportation safety.

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[5] *See id.* at 24,822.

[6] A person "working in supply, storage, or warehouse facilities, or involved in shipping of aircraft parts, supplies or company materials" is classified as "Category 2" personnel. *See id.* at 24,824.

[7] *See id.*

[8] *See id.* at 24,822 (to be codified at 14 C.F.R. § 121.801(a)).

[9] *Id.* at 24,811.

FAA concedes that the Proposed Rule is broad in these respects, yet fails to provide a compelling justification for the Proposed Rule's all-encompassing scope.[10] Despite the plain terms of proposed § 121.801(a), which only apply to persons actually "performing or supervising" transportation-related functions, FAA interprets the Proposed Rule as requiring training for all persons "who could reasonably be foreseen as performing or supervising a TRF, whether or not it is part of his or her job description."[11]

The only rationale FAA advances for this drastic expansion in the scope of its training requirements is an unarticulated need to provide "recognition" training to employees of "will-not-carry certificate holders who are not supposed to handle or transport hazmat."[12] While such recognition training may be desirable, it cannot justify the expansion of hazardous materials training requirements to any employee and supervisor of any "will carry" Part 121 certificate holder merely because that person is somehow "involved" in performing a transportation-related function with respect to an "item" for transport on board an aircraft. FAA must provide a justifiable nexus between its training requirements, the purported rationale for the Proposed Rule, and the transportation of hazardous materials in commerce.

FAA also fails to provide any guidelines governing when an employee could "reasonably be foreseen" as performing or supervising a transportation related function. In the absence of such guidelines, the Proposed Rule would impose yet another impermissibly vague compliance standard on certificate holders. Further, because an employee who supervises or performs a transportation related function that is *not* part of that employee's job description necessarily would be acting outside the scope of his or her employment, no objectively reasonable basis exists for a certificate holder to foresee the performance or supervision of such functions.

Finally, FAA may lack statutory authority to promulgate proposed 14 C.F.R. §§ 121.801(a), 121.802(a), and 121.803(a) to the extent that these proposed regulations would apply to persons who do not perform or supervise any functions with respect to the transportation of hazardous materials in commerce. FAA's statutory authority to establish and implement the certificate program inheres in Part A (Air Commerce and Safety) of Subtitle VII of Title 49 of the U.S. Code. Section 40113(b) of Title 49 states that, in carrying out Part A, the Secretary of Transportation "has the same authority to regulate the transportation of hazardous material by air that the Secretary has under section 5103 of this title." Section 5103 sets forth the Secretary's general regulatory authority under the Hazardous Materials Transportation Law. Regulations promulgated under that authority must apply to a person "(i) transporting hazardous material in commerce; (ii) causing hazardous material to be transported in commerce; or (iii) manufacturing, fabricating, marking, maintaining, reconditioning, repairing, or testing a packaging or a container that is represented, marked, certified, or sold by that person as qualified for use in transporting hazardous material in commerce."[13]

By requiring hazardous materials training for any person who performs or supervises transportation-related functions with respect to "items," which FAA acknowledges include non-

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[10] *See id.* at 24,814.
[11] *Id.*
[12] *See id.* at 24,812.
[13] 49 U.S.C. § 5103(b)(A).

hazardous freight, FAA may regulate persons who do not fall within any of the categories of persons specified in 49 U.S.C. § 5103(a). FAA lacks statutory authority to impose hazardous materials training requirements on such persons, and should accordingly revise the Proposed Rule to demonstrate the statutorily-required nexus between its proposed training requirements and the transportation of hazardous materials in commerce.

3. **Proposed 14 C.F.R. § 121.135:** Like its proposed training requirements, FAA also fails to articulate a reasoned basis for expanding the required manual contents in proposed 14 C.F.R. § 121.135(b)(23)(i) "to assist each person performing or supervising" transportation-related functions "involving items for transport on an aircraft."[14] As discussed above, FAA fails to provide any justification or record support for this departure from the current rules, and the agency may lack statutory authority to require the provision of procedures and information with respect to employees who do not perform or supervise any functions subject to the requirements of the HMR.

4. **Proposed 14 C.F.R. §§ 121.135(b)(23)(ii) and 121.802(a)(3):** Proposed 14 C.F.R. § 121.35(b)(23)(ii) and 121.802(a)(3) require that certificate holders establish and implement procedures and training with respect to undeclared hazardous materials. Specifically, these proposed regulations would require procedures and training to enable employees to identify and reject items that "show signs of containing," "appear to contain," or "may contain" undeclared hazardous materials.[15]

The detection of undeclared hazardous materials is of vital importance to air carriers, for obvious safety reasons. However, FAA has initiated dozens of civil penalty actions against carriers as a result of reporting the discovery of freight that, while appearing to contain solely non-hazardous items, actually contained undeclared hazardous materials. In such penalty actions, FAA has charged air carriers with violations of the HMR because they accepted and/or transported an undeclared shipment with "constructive knowledge" of its contents.

The concept of "constructive knowledge" arises from DOT's statutory authority to impose civil penalties for violations of both the federal Hazardous Materials Transportation Law, 49 U.S.C. §§ 5101 *et seq.*, and the HMR. Specifically, the Hazardous Materials Transportation Law authorizes the Secretary to issue a civil penalty against any person who "knowingly violates" a provision of that Act or the HMR.[16] A person acts knowingly when either (i) the person has "actual knowledge of the factors giving rise to the violation," or (ii) "a reasonable person acting under the circumstances and exercising reasonable care would have that knowledge."[17] In most instances when an air carrier discovers undeclared hazardous materials, the carrier did not have "actual knowledge" of the package's contents. Therefore, in civil penalty actions arising under such facts, the issue is whether, under the circumstances, the air carrier had constructive knowledge that the package contained undeclared hazardous materials – *i.e.*, whether the air carrier "should have known" the package's undeclared contents.

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[14] 68 Fed. Reg. at 24,822.

[15] *Id.* at 24,822-23 (to be codified at 14 C.F.R. §§ 121.135(b)(23)(ii), 121.135(b)(23)(ii)(A), and 121.802(a)(3)).

[16] *See* 49 U.S.C. § 5123(a). The Secretary has delegated to FAA the authority to enforce the HMR through the issuance of civil penalties.

[17] *Id.* § 5123(a)(1)(A)-(B).

As a result of these civil penalty actions, air carriers have demanded that the DOT clarify when a reasonable person accepting or transporting undeclared hazardous materials would be deemed to have knowledge that the package in fact contained hazardous materials. In August 2001, the Office of the Secretary instituted a proceeding for addressing air carriers' concerns,[18] and, on June 19, 2002, the Office of Secretary held a public meeting on the issue of constructive knowledge. At that meeting and in written comments, UPS and other air carriers urged DOT to develop well-conceived indicia of constructive knowledge to be used as presumptions for opening cases against air carriers with respect to the detection of undeclared hazardous materials and to assist carriers in providing training to their employees.

UPS commented that the development of clear presumptions should rest on the following principles. First, it is reasonable to expect carrier personnel to detect bold, obvious indications that an undeclared package contains hazardous materials. A hazard label or an ORM-D marking is an indication that a hazardous material may be present, if such a label or marking is clear and unobstructed. Under those circumstances, the presence of markings may reasonably give rise to a suspicion that a package may contain hazardous materials. Certain textual markings on a package, such as the terms "flammable" or "explosive," also carry meanings that appear clear. However, such markings must be displayed in a size and location that is likely to catch a person's attention when the person is discharging other responsibilities.

Second, DOT should give a carrier the benefit of the doubt when indicators that a package may contain undeclared hazardous materials are, on balance, ambiguous. Certain terms may have multiple meanings in the absence of a UN number or hazard label. For example, the majority of the paint in commerce is not regulated, so the presence on a package of the term "paint," standing alone, is not sufficiently remarkable to cause such a level of doubt or suspicion that a carrier would be required to stop the package in commerce. The presence on a package of an icon not sanctioned by the HMR also should not count against a carrier. Similarly, an employee right-to-know label also should fall outside the range of reasonable expectation for carrier personnel to detect. It is simply not possible to train employees in the meaning of all icons or labels that are not governed by the transport regulations.

Third, it is reasonable to expect transport-related documents to be the source of indicators that a shipment might contain undeclared hazardous materials. UPS relies on very few transport documents. Most of its packages travel with address labels that display a tracking number. But in the event that a shipper uses a UPS waybill, it is reasonable to expect that the text used to describe a shipment could contain indicators about the package's contents. Again, such text must be unambiguous.

Fourth, documents that are unrelated to transportation should not be counted against the carrier. Packing lists, MSDSs, invoices and other documents may accompany a package. Each has its own purpose, but is not normally examined by an air carrier. FAA cannot reasonably construe knowledge on the part of the carrier due to the contents of non-transportation documents. If a carrier is to be held accountable for the contents of a document, it should be only

[18] 66 Fed. Reg. 42,909 (2001).

those documents that the carrier's personnel, such as the driver or sorter, would need to routinely consult.

The development of clear and well-conceived indicia of constructive knowledge is essential to enabling air carriers to implement effective training with respect to undeclared hazardous materials. UPS trains package handlers to stop any package that displays a diamond-shaped hazard label, but has no shipping paper. UPS mandates that every loader of an air container must examine each side of every package loaded, checking not only for hazard labels, but also for ORM-D markings. UPS uses training and quality control methods to ensure that a six-sided check takes place for every package in all air loads. UPS also has detailed procedures for every employee who is expected to handle hazardous materials through the transportation chain.

In order to train personnel with respect to packages that are not supposed to contain hazardous materials, truly effective training depends on clear standards that allow UPS to give its employees simple, direct instructions. Only with a clear set of presumptions as to what will and will not be grounds for enforcement on the basis of constructive knowledge, can UPS can effectively carry out its duties to design and implement a training program covering a huge employee pool handling a staggering number of packages, including hazardous materials, at the speeds demanded by the shipping public.

Despite this demonstrated need for clear indicators with respect to training employees to detect undeclared hazardous materials, the Proposed Rule's requirements for the contents of Part 121 certificate holders' manual and training programs beg the question of how a certificate holder would go about identifying items that "show signs of containing," "appear to contain," or "may contain" undeclared hazardous materials. The Proposed Rule's silence in response to this question is deafening.[19] FAA merely states in the preamble that, in many cases, it has found that "packages not marked and labeled as hazmat still display indicators that would lead a trained person to suspect the presence of hazmat."[20]

As examples of such "indicators," FAA provides the following terms when present on a package or the documentation accompanying a package: "chemicals, lighters, paint or solvents."[21] As discussed above, however, the terms or other indicia used by FAA to justify an enforcement action against an air carrier may be unremarkable in the absence of a UN number or hazard label. Further, a preamble reference to four terms that possibly could indicate the presence of hazardous materials falls far short of providing a certificate holder with any meaningful standards or guidelines to determine whether packages "show signs of containing," "appear to contain," or "may contain" undeclared hazardous materials.

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[19] Indeed, in Appendix N, which ostensibly proposes FAA's "mandated training curriculum," the module devoted to Hidden Dangerous Goods requires training in "Hidden shipment indicators," including "the review and use of [a] Hidden Shipment List" without *any* reference to such indicators or what exactly should be contained on a hidden shipment list. 68 Fed. Reg. at 24,825.

[20] *Id.* at 24,813.

[21] *Id.*

FAA cannot propose to require the establishment of procedures and training with respect to a standard that clearly does not exist. As drafted, the Proposed Rule will leave certificate holders guessing as to what indicators FAA, in its sole, subjective discretion, will deem sufficient to place a carrier on notice that a package may contain hazardous materials – a textbook example of an impermissibly vague regulation. Correlatively, by not establishing any standards or guidelines that are sufficiently clear to put certificate holders on notice of the behavior required of them under the Proposed Rule, FAA has not provided any standards to govern its own enforcement of that Rule. The absence of any standards guarantees confusion for the regulatory community and arbitrary and capricious enforcement on the part of FAA.

5. **Proposed 14 C.F.R. § 121.802(c):** Proposed 14 C.F.R. § 121.802(c) will require each Part 121 certificate holder's hazardous materials training program to be approved by the FAA. The agency correctly notes that this requirement is consistent with the current training requirements contained in 14 C.F.R. Part 121.[22] FAA should confirm in any subsequent notice that certificate holders may continue to submit an outline of their proposed training programs in accordance with 14 C.F.R. § 121.405(a)(1), rather than submitting to the approval of actual text used to carry out the training outline. FAA also should confirm that a certificate holder's current training program will remain in effect pending the agency's approval of the revised training program required under the Proposed Rule. The preamble and the Proposed Rule are silent on this point, and FAA should assure certificate holders that their current training regimes will not be declared invalid at the end of the fifteen-month transition period provided by the Proposed Rule if FAA has yet to review and approve a timely-submitted training program.

FAA also must consider the effect of its vast expansion of the hazardous materials training requirements proposed in this rulemaking on both its current approval process and on certificate holders. The principal operations inspector (POI) is the FAA point of contact for a certificate holder, and is the final approving authority for the certificate holder's hazardous materials training program. The Proposed Rule will require POIs to review and approve all affected certificate holders' revised training programs and manuals, including certificate holders that accept and handle non-hazardous materials. UPS understands that regional hazardous materials managers may assist POIs in this process. However, given the large population regulated under the Proposed Rule and the likely surge in submissions that will occur as the end of the transition period approaches, FAA must demonstrate that the POIs have the knowledge and resources available to conduct a proper and timely review of the revised training programs and manuals.

Finally, certain elements of a certificate holder's current training program for employees which would fall under this proposed expansion of FAA authority may result from requirements imposed by other federal agencies with regulatory authority over the personnel targeted by the Proposed Rule. FAA should confirm that the approval process will not impinge on the authority of such federal agencies to regulate a certificate holder's operations, thus assuring that the certificate holder will not be placed in a position of negotiating with the POI over training curricula that are dictated by other federal training requirements.

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[22] *Id.* at 24,815.

6. Proposed 14 C.F.R. § 121.803(e): Proposed 14 C.F.R. § 121.803(e) will require a certificate holder to "ensure" that each repair station performing work on the certificate holder's behalf is notified in writing and made "aware of" the certificate holder's "policies and operations specifications regarding the acceptance, rejection, handling, storage incidental to transport, and carriage of hazardous materials, including company material."[23] The sole rationale FAA advances for this proposed rule is an inadequately defined need for "better communication between repair stations and the certificate holders regarding the will-carry or will-not-carry status of the certificate holder."[24]

Proposed § 121.803(e), however, bears absolutely no relationship to this proffered rationale. The rule goes far beyond merely requiring a certificate holder to communicate its hazardous materials carry status to its repair stations. Instead, proposed § 121.803(e) requires a certificate holder to make each repair station "aware of" the certificate holder's policies and operations regarding the handling and carriage of hazardous materials.[25] Moreover, proposed § 121.803(e) would require "notice and awareness" to a repair station if it "uses" or "handles" any hazardous materials, even if the repair station does not perform any functions with respect to such hazardous materials that are subject to the HMR. In doing so, the Proposed Rule will require a certificate holder to perform an oversight function for its repair stations that is analogous to a management responsibility. That relationship would far exceed the typical customer/client relationship between a certificate holder and its repair stations.

FAA's "awareness" requirement is not sufficiently clear so that a typical certificate holder would understand the conduct required by the Proposed Rule. Further, proposed § 121.803(e) lacks explicit standards or guidelines to govern its enforcement. The rule is silent as to when a repair station will be deemed to be "aware of" a certificate holder's hazardous materials policies and procedures. FAA merely attempts to define a standard of "awareness" in the preamble by reference to itself – an illogical tautology: "The words 'aware of' would mean that . . . [t]he certificate holder would have to communicate this policy to the repair station and ensure that management *were actually aware of* the certificate holder's policies and procedures regarding hazmat."[26]

An "actual" awareness standard with respect to a third party is inherently subjective and therefore would be impossible for a certificate holder to verify or for FAA to enforce. Moreover, the Proposed Rule fails to address how a certificate holder can ensure its repair station's "actual awareness" over time. To the extent FAA proposes to require that repair stations maintain a perpetual state of actual awareness, UPS submits that such a standard is impossible for a certificate holder to attain, given that repair station management may change without a certificate holder's knowledge. As drafted, proposed § 121.803(e) would create confusion for certificate holders and guarantee arbitrary and capricious enforcement by FAA.

In addition to imposing an impermissibly vague "awareness" requirement on certificate holders, FAA also proposes to apply § 121.803(e) to all repair stations that "handle, use, or

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[23] *Id.* at 24,823.
[24] *Id.* at 24,816.
[25] *Id.* at 24,823.
[26] *Id.* at 24,816 (emphasis added).

replace" any material regulated under the HMR, including "consumable hazardous materials and aircraft parts containing hazardous materials."[27] Thus, FAA proposes to require a certificate holder to communicate and verify awareness of its hazardous materials policies and procedures to a repair station that may not perform any functions regulated by the HMR merely because the repair station uses or handles hazardous materials during its operations. UPS submits that *all* repair stations likely "use" or "handle" materials classified as hazardous materials during the course of their operations. Thus, proposed § 121.803(e) quite possibly could require "notice and awareness" for every repair station utilized by a certificate holder.

FAA provides absolutely no justification for requiring "notice and awareness" to repair stations who use or handle hazardous materials that are never intended to be transported aboard an aircraft. As drafted, proposed § 121.803(e) would require a certificate holder to provide notice and ensure a repair station's awareness if that repair station used a hazardous material solvent to clean parts or even a consumer commodity to clean its facility's restroom merely because such materials are regulated by the HMR. Further, such requirements may fall outside FAA's statutory authority to regulate hazardous materials as provided in 49 U.S.C. §§ 5103 and 40113(b). In order to impose the requirements proposed in § 121.803(e), FAA must demonstrate some nexus between a repair station's handling of hazardous materials and the transportation of such materials aboard an aircraft.

FAA also fails to take into account or even consider the effect of multiple notifications on a repair station that performs work for more than one certificate holder. Becoming "aware" of the variances in certificate holders' hazardous materials policies and procedures may lead to more confusion on the part of repair stations, rather than an awareness of such policies.

Finally, the exception FAA proposes in § 121.803(c) applicable to persons who work for more than one certificate holder prescribes a prerequisite to the exception's application that is impossible to satisfy. Proposed § 121.803(c)(1) would require a certificate holder to receive written verification from an "authorized, knowledgeable person representing the other certificate holder" concerning the repair station employee's satisfactory completion of hazardous materials training. While a certificate holder objectively may confirm whether a representative of another certificate holder is "authorized," FAA provides no standards or guidelines for how a certificate holder can determine whether a person is "knowledgeable." Again, FAA proposes an inherently subjective standard that would be impossible for a certificate holder to determine or for FAA to enforce.

7. **Proposed 14 C.F.R. § 121.804:** Proposed 14 C.F.R. § 121.804(a), (b), and (c) will impose unnecessary and unduly burdensome recordkeeping requirements upon certificate holders. First, proposed § 121.804(a) will require certificate holders to maintain a record of "all training required by this part" for any person who performs or supervises a function specified in § 121.801(a), including independent contractors and subcontractors retained by the certificate holder to perform such functions.

The current 14 C.F.R. Part 121 hazardous materials training regulations and the revisions proposed in this rulemaking apply to "certificate holders." Accordingly, unless a certificate

[27] *Id.*

holder's contractors act in a capacity regulated by the current Part 121 regulations, they will not be subject to the hazardous materials training requirements under that Part. To the extent that the Proposed Rule will require certificate holders to maintain other types of training records required by 14 C.F.R. Part 121, FAA fails to provide any justification for why a certificate holder should act as a repository for such records. FAA currently has the authority under 14 C.F.R. Part 121 to obtain training records directly from a certificate holder's contractors. The responsibility for maintaining a contractor's Part 121 records should therefore continue to lie with the contractor itself.

Moreover, because the transportation functions specified in § 121.801(a) pertain to the air transport of "items" rather than "hazardous materials," proposed § 121.804(a) will require a certificate holder to retain hazardous materials training records for independent contractors and subcontractors who perform functions not subject to the requirements of the HMR. FAA provides absolutely no justification for such an expansive record-keeping requirement in the Proposed Rule, and UPS submits that there is none. Further, as with other provisions of the Proposed Rule, FAA may lack statutory authority to impose this requirement pursuant to 49 U.S.C. §§ 5103 and 40113(b).

FAA also must consider the possible adverse consequences that might result if a certificate holder's retention of its contractor's training records gives rise to issues of co-employment. The distinction between a principal and its independent contractor is well-established under the law. Requiring a certificate holder to retain training records on behalf of their independent contractors may blur this discreet relationship, and give rise to a presumption that personnel employed by the contractor are employees of the certificate holder. As a result, FAA's proposed requirement could reduce or eliminate benefits to both parties that inure from their well-defined rights, duties, and liabilities under the law.

Second, proposed § 121.804(b) will require a certificate holder to retain a record of all training required by proposed 14 C.F.R. Part 121 received within the preceding three years "where the trained person performs or supervises the function specified in § 121.801(a)." It is unclear whether proposed § 121.804(b) will require the retention of paper records, or whether FAA will permit a certificate holder to maintain electronic copies of such records. Many certificate holders, including UPS, utilize electronic databases to store their training records. As such, requiring certificate holders to maintain an actual paper copy of its training records would impose an unduly burdensome paperwork requirement on certificate holders.[28] Given that an employee's training is verified by the information contained in the training record rather than the form of the record itself, FAA should permit certificate holders to maintain electronic hazardous materials training records. Indeed, the data proposed to be included in the amended training records should be revised to allow the continued use of computer databases in which current training records are stored.

Additionally, because the scope of the Proposed Rule could require training for employees who perform their functions in a mobile environment (*e.g.*, package car drivers,

[28] The required use of paper training records also could reduce the visibility of an organization's hazmat employees to management because it lacks an electronic system's capability to produce a consolidated spreadsheet of such employees.

managers with more than one assigned location, etc.), FAA should permit a certificate holder to make hazardous materials training information readily accessible to the agency, rather than requiring mobile employees to keep a copy of their training records on their person at all times. In its recent rulemaking revising the notification of pilot-in-command regulations, RSPA adopted a similar approach that permits an aircraft operator to retain at either the departure airport or the operator's principal place of business a copy of each notification, an electronic image thereof, or the information contained therein.[29] FAA should revise the Proposed Rule to adopt a similar approach that permits a certificate holder to maintain a computer record of training at its principal place of business, at the location where the trained person performs or supervises a function regulated under the HMR, or at another location approved by the POI.

Finally, proposed § 121.804(c) will require that training records contain a certification "signed and dated by a person designated by the Director of Training."[30] UPS notes that it does not employ a "Director of Training," nor is UPS aware of any statute or regulation requiring the creation or maintenance of such a position.

8. Proposed Appendix N: Proposed Appendix N prescribes the requirements for hazardous materials training under Part 121, and contains thirteen training "modules" applicable to certain classes of employees.[31] UPS questions the need for such an inflexible training regimen, given the great variations in business models among carriers. In addition, the Appendix N requirements must recognize that training delivered to employees should be commensurate with those employees' responsibilities, a point that is not articulated in the Proposed Rule.

FAA should remove Appendix N from the Proposed Rule and place it in an advisory circular, which would provide certificate holders greater flexibility in structuring their own hazardous materials training programs. Further, it is unclear whether Appendix N dictates a specific order of providing training in each module (*e.g.*, whether module 5 must always precede module 6). UPS has substantial experience in developing and implementing hazardous materials training programs, and the order in which UPS provides such training differs from that provided in Appendix N in order to account for UPS's specific operations. FAA should provide certificate holders operational flexibility and should confirm that the order of providing training under the modules is suggested, not mandated, in order to account for variations among certificate holders.

9. The Proposed Rule Rests Upon a Gross Miscalculation of Training Costs: FAA estimates that the Proposed Rule will require all "will carry" Part-121 certificate holders to provide an additional fifteen (15) hours of initial training and an additional four (4) hours of recurrent training to affected employees.[32] In year one, FAA estimates that all such certificate holders will incur approximately $1,940,618 in costs to provide an estimate 3,530 employees with an additional fifteen hours of initial training at a cost of $36.65 per hour.[33] In year two,

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[29] 68 Fed. Reg. 14,341, 14,347 (to be codified at 49 C.F.R. § 175.33(c)).

[30] 68 Fed. Reg. at 24,823 (to be codified at 14 C.F.R. § 121.804(c)(3)).

[31] *See id.* at 24,824-25.

[32] *See* U.S. Dept. of Transp., Federal Aviation Admin., Draft Regulatory Impact Analysis, Initial Regulatory Flexibility Determination, Trade Impact Assessment, and Unfunded Mandates, FAA-2003-15085-3, at 19 (Dec. 1999) (Revised Apr. 2001) [hereinafter the "*Draft Impact Analysis*"].

[33] *See id.* at 21, Table 7.

FAA estimates that "will carry" Part-121 certificate holders will incur approximately $517,498 in costs to provide the same employees four hours of recurrent training at $36.65 per hour.[34] Thus, for the first two years under the regulatory regime advanced by the Proposed Rule, FAA estimates that "will carry" Part 121 certificate holders will incur approximately $2,458,116 in initial and recurrent training costs for their current employees.

The cost figures utilized by FAA appear to lack any basis in reality. For example, UPS must pay flight crew members – a class of employees who ostensibly would require additional training under the Proposed Rule – for a minimum of four hours of time on days of classroom training, even if the duration of such training is less than four hours. Thus, if a new classroom recurrent training program is required, the entire flight crew workforce will require a minimum of four hours of pay for hazardous materials classroom instruction, since the existing recurrent training does not employ *classroom* hazardous materials instruction. UPS would expect to incur approximately $1.72 million in costs for this time. That figure alone is approximately seventy percent (70%) of the costs estimated by FAA for *all* "will carry" Part 121 certificate holders during the first two years under the Proposed Rule. FAA's estimated costs, therefore, simply cannot be reconciled with actual training costs. Importantly, existing recurrent training for UPS flight crew members does not cause the incurrence of this classroom training cost because crew members complete such training by means of an FAA-approved home-study packet. Appendix N to the Proposed Rule is silent concerning whether FAA will continue to consider home study an acceptable method for providing recurrent training. Given the enormous costs associated with classroom training of flight crew members, FAA should confirm that the Proposed Rule will not alter the current FAA-approved practice of home study recurrent training for flight crew members.

Of course, flight crew members are only one discreet subset of employees who may be subject to the Proposed Rule's training requirements. UPS estimates that under its FAA-approved program, it currently trains approximately 15,000 of its employees engaged in operations related directly to hazardous materials transportation safety. UPS estimates that the actual time and development costs for one hour of annual general training for these employees alone exceed $3.5 million. Further, because of the Proposed Rule's broad definition of "transportation-related functions," the number of employees requiring training could increase by an order of magnitude.[35] These cost and employment figures lead UPS to seriously question both FAA's estimates of the Part 121 employees who may be subject to the Proposed Rule, as well as the estimated $36.65 per hour cost of providing additional training.

Further, proposed 14 C.F.R. §§ 121.801(a) and 121.803(a) could require package car drivers and customer-counter personnel to obtain training under an FAA-approved training program merely because they perform, among other things, "acceptance," "rejection," "handling," "loading," and "unloading" functions involving "items" destined for transport aboard

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[34] *See id.*

[35] Under the HMR, approximately 300,000 UPS employees could be classified as "hazmat employees." Depending upon FAA's application of the definition of a "transportation related function" in the Proposed Rule, as well as the potential need to train those who could reasonably be foreseen as performing or supervising a transportation related function, whether or not it is part of their job description, many of these employees could be required to receive FAA-approved training – yielding an increase of up to 2000% in the number of UPS employees requiring FAA-approved training, depending on the FAA's intended reach in this rulemaking.

an aircraft. UPS employs a driver workforce of 75,000, and incurs costs of approximately $3,465,750 for each hour of training provided to that workforce. If the Proposed Rule requires UPS drivers to obtain additional training, then UPS will incur staggering costs: Fifteen hours of additional initial training would cost approximately $51,986,250 and four hours of recurrent training would cost approximately $13,863,000. Such costs far exceed the $16 million in costs that FAA estimates *all* "will carry" Part 121 certificate holders will incur *over a ten-year period.*[36]

FAA cannot rely on such unrealistic cost estimates. In any subsequent notices in this rulemaking, FAA must consider cost estimates that accurately reflect the financial burden that the Proposed Rule will impose on "will carry" Part 121 certificate holders.

Respectfully submitted, this 5th of September, 2003.

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[36] *See Draft Impact Analysis*, at 20.